UMW EQUIPMENT SDN BHD

v.

PARANTAMAN RAMASAMY & ANOR

COURT OF APPEAL, PUTRAJAYA
LOW HOP BING JCA
ABU SAMAH NORDIN JCA
ALIZATUL KHAIR OSMAN JCA
[CIVIL APPEAL NO: W-02-1021-09]
13 FEBRUARY 2014

ADMINISTRATIVE LAW: *Judicial review - Certiorari - Application for - Findings by Industrial Court that dismissal was harsh, disproportionate and without just cause or excuse - Whether Industrial Court took into account irrelevant matters in arriving at decision - Whether High Court erred in affirming Industrial Court's decision - Whether High Court's determination on matter of fact constituted jurisdictional error warranting appellate intervention*

LABOUR LAW: *Industrial Court - Dispute over wrongful dismissal - Employee given warnings at previous domestic enquiry for similar misconduct - Admission to charge of coming late to work - Misconduct successfully proved - Findings by Industrial Court that dismissal was harsh, disproportionate and without just cause or excuse - Whether Industrial Court correct in findings - Whether High Court erred in affirming Industrial Court's decision*

This appeal originated from a claim in the Industrial Court for reinstatement by the first respondent against his employer ('the appellant') for alleged wrongful dismissal. The respondent started work with the appellant in 1981 and was dismissed by the appellant on 1 September 1998 after a domestic enquiry ('second enquiry') which found him guilty of three charges of misconduct which occurred in June and July 1998. The first charge against the respondent was for coming to work late on ten occasions, the second charge was for leaving office early without permission on eight occasions, the third charge was for being absent without authorisation on eight occasions and the fourth charge was for failure to produce medical certificates during medical leave. In the Industrial Court, the first respondent claimed that he was victimised and dismissed by the appellant without just cause or excuse. The Industrial Court found that the charge against the

first respondent for coming to work late on nine occasions had been proved based on the respondent's own admission. Despite the said finding and the respondent's admission, the Industrial Court came to the conclusion that the respondent was dismissed without just cause or excuse. The Industrial Court was of the opinion that the punishment of dismissal was too harsh despite the final warning given to the respondent after he was found guilty of similar charges of misconduct in the first domestic enquiry. Dissatisfied with the decision of the Industrial Court, the appellant applied to the High Court for an order of *certiorari* to quash the decision of the Industrial Court. The High Court dismissed the appellant's application for judicial review with costs, notwithstanding that the charge against the respondent had been proved. Hence, this appeal. The main ground of appeal by the appellant was that the High Court committed a glaring error of law in affirming the decision of the Industrial Court despite acknowledging that the Industrial Court took into account irrelevant matters in arriving at its decision and that it was the management's prerogative to regulate rules relating to employees' discipline.

Held (allowing appeal with costs; setting aside decision of High Court):

Per Abu Samah Nordin JCA delivering the judgment of the court:

(1) Judicial review was not an appeal but a review of the manner in which the decision was made. The High Court was not entitled on an application for judicial review to consider whether the decision itself, on the merits of the facts, was fair and reasonable. The circumstances under which the High Court could interfere with the decision of the Industrial Court were limited. In exercising judicial review, the High Court was obliged not to interfere with the findings of the Industrial Court unless they were found to be unreasonable. (para 12)

(2) The High Court had in its grounds of judgment acknowledged that the Industrial Court had taken into account irrelevant matters but fell into error in affirming the decision of the Industrial Court. Like the Industrial Court, the High Court disregarded the fact that the respondent admitted to the charge of coming late to office. The primary function of the Industrial Court was to determine whether the misconduct or

irregularities complained of had in fact been committed, and if so, whether such grounds constitute just cause or excuse for the dismissal. (para 17)

(3) The jurisdiction to issue *certiorari* was supervisory. The court does not sit as an appellate authority and will not review merely an erroneous finding of facts unless completely unsupported by evidence which then was regarded as an error of law. The Industrial Court's conclusion that the respondent had been dismissed without just cause or excuse could not stand in the wake of its own finding that the charge for coming to work late on nine occasions had been proved. It was a perverse finding to exculpate the appellant who had admitted to the charge against him. (paras 18 & 19)

(4) The High Court had committed an error of law in affirming the decision of the Industrial Court notwithstanding its own findings that the Industrial Court had taken into consideration irrelevant matters in holding that the respondent had been dismissed without just cause or excuse. The first domestic enquiry found the respondent guilty of five charges of misconduct but the appellant gave him another opportunity by giving him a final warning. The misconduct which preceded the second enquiry left the appellant with no choice but to terminate his employment. Past misconduct was a relevant factor and the Industrial Court, had in the past, took into consideration in determining whether the punishment was harsh or otherwise. (paras 20 & 22)

Bahasa Malaysia *Translation Of Headnotes*

Rayuan ini bermula daripada tuntutan di Mahkamah Perusahaan bagi pelantikan semula responden pertama terhadap majikannya, ('perayu') untuk pemecatan salah. Responden telah mula bekerja dengan perayu pada tahun 1981 dan telah dipecat oleh perayu pada 1 September 1998 selepas siasatan dalaman kedua ('siasatan kedua') yang mendapati dia bersalah atas tiga tuduhan salah laku yang berlaku pada bulan Jun dan Julai 1998. Tuduhan pertama terhadap responden adalah untuk kelewatan datang bekerja sebanyak sepuluh kali, pertuduhan kedua adalah untuk meninggalkan pejabat lebih awal tanpa kebenaran sebanyak lapan kali, pertuduhan ketiga adalah kerana tidak hadir tanpa kebenaran sebanyak lapan kali dan pertuduhan keempat adalah kegagalan

mengemukakan perakuan sijil cuti sakit semasa cuti sakit. Di Mahkamah Perusahaan, responden pertama mendakwa bahawa dia telah dijadikan mangsa dan dipecat oleh perayu tanpa sebab atau alasan yang adil. Mahkamah Perusahaan mendapati bahawa pertuduhan terhadap responden pertama bagi tuduhan kelewatan datang bekerja sebanyak sembilan kali telah dibuktikan berdasarkan pengakuan responden sendiri. Walaupun dengan dapatan dan pengakuan responden sendiri, Mahkamah Perusahaan telah membuat kesimpulan bahawa responden telah dipecat tanpa sebab atau alasan yang adil. Mahkamah Perusahaan berpendapat bahawa hukuman pemecatan adalah terlalu berat walaupun amaran terakhir telah diberikan kepada responden selepas didapati bersalah atas tuduhan salah laku yang sama dalam siasatan domestik pertama. Tidak berpuas hati dengan keputusan Mahkamah Perusahaan, perayu memohon kepada Mahkamah Tinggi untuk suatu perintah *certiorari* bagi membatalkan keputusan Mahkamah Perusahaan. Mahkamah Tinggi telah menolak permohonan perayu untuk semakan kehakiman dengan kos walaupun pertuduhan terhadap responden telah dibuktikan. Oleh itu, rayuan ini. Alasan utama rayuan oleh perayu adalah bahawa Mahkamah Tinggi telah membuat kekhilafan yang amat nyata dari segi undang-undang dengan mengesahkan keputusan Mahkamah Perusahaan walaupun mengakui bahawa Mahkamah Perusahaan telah mengambil kira perkara-perkara yang tidak relevan dalam membuat keputusannya dan bahawa ia adalah prerogatif pengurusan untuk mengawal selia kaedah-kaedah yang berkaitan dengan disiplin.

Diputuskan (membenarkan permohonan dengan kos; mengenepikan perintah Mahkamah Tinggi):
Oleh Abu Samah Nordin HMR menyampaikan penghakiman mahkamah:

(1) Semakan kehakiman bukanlah suatu rayuan tetapi suatu kajian semula terhadap cara keputusan tersebut dibuat. Mahkamah Tinggi tidak berhak ke atas suatu permohonan bagi semakan kehakiman untuk menentukan sama ada keputusan itu sendiri, di atas merit fakta-fakta, adalah adil dan berpatutan. Keadaan di mana Mahkamah Tinggi boleh mengganggu keputusan Mahkamah Perusahaan adalah terhad. Dengan menjalankan semakan kehakiman, Mahkamah Tinggi telah diwajibkan supaya tidak mengganggu dapatan Mahkamah Perusahaan kecuali dapatan tersebut adalah tidak munasabah.

(2) Mahkamah Tinggi telah, dalam alasan penghakimannya, mengakui bahawa Mahkamah Perusahaan telah mengambil kira perkara-perkara yang tidak relevan tetapi terkhilaf dalam mengesahkan keputusan Mahkamah Perusahaan. Seperti Mahkamah Perusahaan, Mahkamah Tinggi tidak mengambil kira fakta bahawa responden telah mengaku salah terhadap tuduhan kelewatan datang bekerja. Fungsi utama Mahkamah Perusahaan adalah untuk menentukan sama ada salah laku atau ketidakaturan yang diadukan sebenarnya telah dilakukan, dan jika ya, sama ada alasan tersebut menyebabkan pemecatan yang bersebab atau alasan yang adil.

(3) Bidang kuasa untuk mengeluarkan *certiorari* adalah penyeliaan. Mahkamah tidak bersidang sebagai pihak berkuasa rayuan dan tidak akan semata-mata membuat semakan semula dapatan fakta yang salah melainkan jika ia benar-benar tidak disokong oleh bukti yang kemudiannya dianggap sebagai kesilapan undang-undang. Keputusan Mahkamah Perusahaan bahawa responden telah dipecat tanpa sebab atau alasan yang adil tidak boleh dipertahankan susulan daripada dapatannya sendiri bahawa tuduhan untuk kelewatan datang bekerja sebanyak sembilan kali telah dibuktikan. Ia adalah suatu dapatan bertentangan untuk membebaskan perayu yang mengakui pertuduhan terhadapnya.

(4) Mahkamah Tinggi telah melakukan kekhilafan undang-undang dalam mengesahkan keputusan Mahkamah Perusahaan walau pun membuat dapatan sendiri bahawa Mahkamah Perusahaan telah mengambil kira perkara-perkara yang tidak relevan dalam berpendapat bahawa responden telah dipecat tanpa sebab atau alasan yang adil. Siasatan domestik pertama mendapati responden bersalah ke atas lima tuduhan salah laku tetapi perayu telah memberinya peluang dengan memberinya amaran terakhir. Salah laku yang mendahului siasatan kedua telah meninggalkan perayu tanpa pilihan kecuali untuk menamatkan pekerjaannya. Salah laku terdahulu merupakan faktor relevan dan Mahkamah Perusahaan, telah pada masa lalu, mengambil kira dalam menentukan sama ada hukuman tersebut berat atau sebaliknya.

Case(s) referred to:

Ashbridge Investments Ltd v. Minister of Housing and Local Government [1965] 1 WLR 1320 ***(refd)***

Chief Constable of the North Wales Police v. Evans [1982] 3 All ER 141 ***(refd)***

Goon Kwee Phoy v. J & P Coats (M) Bhd [1981] 1 LNS 30 FC ***(refd)***
Harpers Trading (M) Sdn Bhd v. National Union of Commercial Workers [1991] 2 CLJ 881; [1991] 1 CLJ (Rep) 159 SC ***(refd)***
Hoh Kiang Ngan v. Mahkamah Perusahaan Malaysia & Anor [1996] 4 CLJ 687 FC ***(refd)***
Holiday Villages of Malaysia Sdn Bhd v. YB Menteri Sumber Manusia & Anor [2008] 9 CLJ 110 HC ***(refd)***
Kamala Loshanee Ambalavanar v. Jaffnese Co-operative Society [1998] 1 LNS 339 HC ***(refd)***
Mak Sik Kwong v. Minister of Home Affairs, Malaysia (No 2) [1975] 1 LNS 97 HC ***(refd)***
Malayan Banking Bhd v. Association of Bank Officers Peninsular Malaysia & Industrial Court [1988] 1 CLJ 276; [1988] 1 CLJ (Rep) 183 SC ***(refd)***
Milan Auto Sdn Bhd v. Wong Seh Yen [1995] 4 CLJ 449 FC ***(refd)***
Non-Metallic Mineral Products Manufacturing Employees Union & Ors v. South East Asia Fire Bricks Sdn Bhd [1976] 1 LNS 85 FC ***(refd)***
R Rama Chandran v. Industrial Court of Malaysia & Anor [1997] 1 CLJ 147 FC ***(refd)***
Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd [2010] 8 CLJ 629 FC ***(refd)***
Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Anor v. Arab-Malaysian Prima Realty Sdn Bhd & Ors [2003] 3 CLJ 349 FC ***(refd)***
Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union [1995] 2 CLJ 748 CA ***(refd)***
Wong Yuen Hock v. Syarikat Hong Leong Assurance Sdn Bhd & Another Appeal [1995] 3 CLJ 344 FC ***(refd)***

For the appellant - A Ramadass (M Jothiletchimy with him); M/s Ramadass & Assocs
For the respondent - Harpal Singh (Lua Ai Siew with him); M/s AJ Ariffin, Yeo and Harpal

[Appeal from High Court, Kuala Lumpur; Judicial Review No: R5-(R3)-25-364-06]

Reported by Sandra Gabriel

JUDGMENT

Abu Samah Nordin JCA:

[1] This appeal originated from a claim in the Industrial Court for reinstatement by an employee ('the respondent') against his employer ('the appellant') for alleged wrongful dismissal by the latter. In this judgment, reference to the word 'respondent' means

the first respondent. The second respondent is only a nominal respondent. The respondent started work with the appellant in 1981 as a sales executive. In 1995, he was promoted as a sales manager. He was dismissed by the appellant on 1 September 1998 after a domestic enquiry ('second enquiry') held on 11 August 1998 found him guilty of three charges of misconduct. At the time of his dismissal the respondent's post was redesignated as warranty claims manager.

[2] The first charge against the respondent was for coming to work late on ten occasions in June and July 1998. The second charge was for leaving office early without permission on eight occasions in June and July 1998. The third charge was for being absent without authorisation on eight occasions in June and July 1998. The fourth charge was for failure to produce medical certificates for 7 and 10 July 1998, which he claimed that he was on medical leave. The domestic enquiry decided in his favour in respect of the fourth charge.

[3] In the Industrial Court, the respondent claimed that he was victimised and dismissed by the appellant without just cause or excuse. In his evidence before the Industrial Court he pointed out several instances of victimisation which were however denied by the appellant. He claimed that he was traumatised when his position as a sales manager was redesignated as a warranty claims manager, which was, to him, a demotion.

[4] The Industrial Court found that the charges for leaving office early without permission, for being absent without authorisation and for not producing medical certificates on the days the respondent was on medical leave had not been proven. It however found that the charge against the respondent for coming to work late on nine occasions (excluding 1 June 1998) in June and July 1998 had been proven based on the respondent's own admission. This was what the Industrial Court said:

> The charge of coming to work late on nine occassions in June and July 1998 has been proved based on the claimant's admission that he came to work late on the days stated in CO-22 except for 1 June 1998 when he was still on suspension.

[5] Despite the abovesaid finding and the respondent's own admission to the charge for coming late to work, the Industrial Court came to the conclusion that the respondent was dismissed without just cause or excuse. The Industrial Court was of the

opinion that the punishment of dismissal for coming to work late "was too harsh despite the final warning" given to the respondent after he was found guilty of similar charges of misconduct in an earlier domestic enquiry which preceded the second enquiry. The first enquiry was held on 20 April 1998. The justification given by the Industrial Court was that on the days he was late to work in June and July 1998, he was late by a few minutes on four occasions and by less than thirty minutes on another four occasions. On one occasion, he was late by one hour 21 minutes. Understandably, the appellant was upset with the decision that the respondent was dismissed without just cause or excuse, notwithstanding the latter's own admission to the charge for coming to work late. It then applied to the High Court for an order of *certiorari* to quash the decision of the Industrial Court.

[6] The High Court dismissed the appellant's application for judicial review to quash the decision of the Industrial Court with costs notwithstanding that the charge against the respondent for coming to work late on nine occasions in June and July 1998 had been proven.

[7] The learned Judicial Commissioner ('JC'), in dismissing the application for judicial review, agreed with the appellant's contention that the Industrial Court took into account irrelevant factors and that it was the management's prerogative to regulate rules in matters of discipline but it justified the decision of the Industrial Court on the ground that only one charge was proved against the respondent whilst the other charges were not proven. For convenience, we reproduce what the learned JC said in her grounds of judgment:

> Saya bersetuju dengan hujahan pemohon bahawa dengan mempersoalkan keperluan Responden mengetip kad perakam waktu, mempersoalkan keperluan Responden datang ke pejabat dahulu, bahawa kredit harus diberi kepada Responden untuk penjualan earth moving equipment dan pemohon perlu menetapkan target kepada Responden, **Pengerusi itu telah mengambil kira faktor-faktor yang tidak relevan** kepada isu yang dibicarakan iaitu sama ada Responden datang lambat, balik cepat dan tidak datang kerja tanpa kebenaran. Pihak pengurusan pemohon berhak membuat peraturan berkaitan disiplin pekerja. Lagipun Responden bukan lagi bekerja sebagai Pengurus Pemasaran yang memerlukan beliau berjumpa pelanggan. (emphasis added)

[8] The main ground of appeal by the appellant was that the High Court committed a glaring error of law in affirming the decision of the Industrial Court despite acknowledging that the Industrial Court took into account irrelevant matters in arriving at its decision and that it was the management's prerogative to regulate rules relating to employees' discipline (*Hoh Kiang Ngan v. Mahkamah Perusahaan Malaysia & Anor* [1996] 4 CLJ 687, *Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union* [1995] 2 CLJ 748.

[9] The respondent contended that the appeal was essentially on concurrent findings of facts which should not be disturbed (*Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Anor v. Arab-Malaysian Prima Realty Sdn Bhd & Ors* [2003] 3 CLJ 349; [2003] 3 MLJ 257) and that there is a presumption that the High Court judge had rightly exercised her discretion (*Holiday Villages of Malaysia Sdn Bhd v. YB Menteri Sumber Manusia & Anor* [2008] 9 CLJ 110; [2009] 6 MLJ 402).

[10] The appeal by the appellant against the decision of the High Court did not involve any novel or difficult issue of law relating to judicial review. As in most cases of wrongful dismissal, it turned on the application of settled principles of law to the facts of each particular case. Lord Brightman in *Chief Constable of the North Wales Police v. Evans* [1982] 3 All ER 141 at p. 514 stressed that, "Judicial review is concerned, not with the decision, but with the decision making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of powers, be itself guilty of usurping power".

[11] It was held in *Harpers Trading (M) Sdn Bhd v. National Union of Commercial Workers* [1991] 2 CLJ 881; [1991] 1 CLJ (Rep) 159; [1991] 1 MLJ 417 SC that judicial review is not an appeal but a review of the manner in which the decision was made and the High Court is not entitled on an application for judicial review to consider whether the decision itself, on the merits of the facts, was fair and reasonable.

[12] The circumstances under which the High Court can interfere with the decision of the Industrial Court are limited. The Federal Court in *Non-Metallic Mineral Products Manufacturing Employees Union & Ors v. South East Asia Fire Bricks Sdn Bhd* [1976] 1 LNS 85; [1976] 2 MLJ 67 had made it clear that the Industrial Court

is charged with findings of fact and "unless it can be shown that the evidence was so much one way that no reasonable tribunal could have disregarded it, it is not possible to interfere with its findings of facts". Mohd Azmi FCJ, in delivering the judgment of the Federal Court in *Wong Yuen Hock v. Syarikat Hong Leong Assurance Sdn Bhd & Another Appeal* [1995] 3 CLJ 344; [1995] 2 MLJ 753 reaffirmed the principle that in exercising judicial review the High Court was obliged not to interfere with the findings of the Industrial Court unless they were found to be unreasonable, in the sense that no reasonable man or body of men could reasonably come to the conclusion that it did or that the decision of the Industrial Court looked at objectively, were so devoid of any plausible justification that no reasonable person or body of persons could have reached them.

[13] The Federal Court in that case approved what it had previously said in *Goon Kwee Phoy v. J & P Coats (M) Bhd* [1981] 1 LNS 30; [1981] 2 MLJ 129 where Raja Azlan Shah CJ said:

> Where representations are made and are referred to the Industrial Court for enquiry, it is the duty of that court to determine whether the termination or dismissal is with or without just cause or excuse. If the employer chooses to give a reason for the action taken by him, the duty of the Industrial Court will be to enquire whether that excuse or reason has or has not been made out. If it finds as a fact that it has not been proved, then the inevitable conclusion must be that the termination or dismissal was without just cause or excuse. The proper enquiry of the court is the reason advanced by it and that court or the High Court cannot go into another reason not relied on by the employer or find one for it.

[14] The court can interfere on the ground that the decision maker had acted on no evidence or had come to a conclusion which on evidence it could not reasonably come. (*Malayan Banking Bhd v. Association of Bank Officers Peninsular Malaysia & Industrial Court* [1988] 1 CLJ 276; [1988] 1 CLJ (Rep) 183); *Ashbridge Investments Ltd v. Minister of Housing and Local Government* [1965] 1 WLR 1320. That was, in general, the state of the law until 1997 when the Federal Court in *R Rama Chandran v. Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147; [1997] 1 MLJ 145 held that the decision of an inferior tribunal may be reviewed on the grounds of illegality, irrationality and possibly proportionality, thus allowing the courts to scrutinise the decision not only for process but also for substance.

[15] It is now settled that the decision of an inferior tribunal is amenable to judicial review where the facts do not justify the decision or where the findings of the Industrial Court are arrived at by taking into consideration irrelevant matters or disregarding relevant matters. The Federal Court in *Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd* [2010] 8 CLJ 629; [2010] 6 MLJ 1 had the occasion to revisit the decision in *R Rama Chandran supra* and after referring to the cases before and after the decision in *R Rama Chandran* unanimously concluded that the decision of an inferior tribunal is amenable to judicial review where the facts do not support the conclusion arrived at by the Industrial Court or the findings of the Industrial Court had been arrived at by taking into consideration irrelevant matters or disregarding relevant matters.

[16] Raus Sharif FCJ (as he then was), in delivering the judgment of the Federal Court said:

> It is clear from the above authorities that the scope and ambit of *Rama Chandran* had been clearly explained and clarified. Decided cases cited above have also clearly established that where the facts do not support the conclusion arrived at by the Industrial Court, or where the findings of the Industrial Court had been arrived at by taking into consideration irrelevant matters, and had failed to consider relevant matters into consideration, such findings are always amendable to judicial review. (See paragraph 19)

[17] We agreed with learned counsel for the appellant that the High Court had in its grounds of judgment acknowledged that the Industrial Court had taken into account irrelevant matters but fell into error in affirming the decision of the Industrial Court. Like the Industrial Court, the High Court disregarded the fact that the respondent admitted to the charge of coming late to office. The primary function of the Industrial Court is to determine whether the misconduct or irregularities complained of had in fact been committed, and if so, whether such grounds constitute just cause or excuse for the dismissal (*Wong Yuen Hock*, *supra*, *Milan Auto Sdn Bhd v. Wong Seh Yen* [1995] 4 CLJ 449).

[18] Jurisdiction to issue *certiorari* is supervisory and the court does not sit as an appellate authority and will not review merely an erroneous finding of facts unless completely unsupported by evidence which then is regarded as an error of law. (*Mak Sik Kwong v. Minister of Home Affairs, Malaysia (No 2)* [1975] 1 LNS 97; [1975] 2 MLJ 175).

[19] In this case the respondent did in fact commit the acts as alleged in the first charge. Could it then be said that he was dismissed without just cause or excuse?. In our judgment the Industrial Court's conclusion that the respondent had been dismissed without just cause or excuse could not stand in the wake of its own finding that the charge for coming to work late on nine occasions in June and July 1998 had been proved. The facts as found by the Industrial Court did not support its own conclusion. It was a perverse finding to exculpate the appellant who had admitted to the charge against him.

[20] It is manifestly obvious from the judgment of the High Court that it had committed an error of law in affirming the decision of the Industrial Court notwithstanding its own findings that the Industrial Court had taken into consideration irrelevant matters in holding that the respondent had been dismissed without just cause or excuse. An inferior tribunal has no jurisdiction to commit an error of law. If it does make such an error, it exceeds its jurisdiction.

[21] In *Hoh Kiang Ngan*, *supra* the Federal Court agreed with the Court of Appeal in *Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union* [1995] 2 CLJ 748 on what constitute an error of law:

> But it may safely be said that an error of law would be disclosed if the decision-maker asks himself the wrong question or takes into account irrelevant consideration or omits to take into account relevant consideration (what may be conveniently termed as an *Anisminic* error) or if he misconstrues the terms of any relevant statutes, or misapplies or misstates a principle of the general law. Since an inferior Tribunal has no jurisdiction to make an error of law, its decisions will not be immunized from judicial review by an ouster clause however widely drafted.

[22] As far as punishment was concerned, the facts showed that this was not the first time that the respondent had been brought before the domestic enquiry for similar misconduct. The first domestic enquiry which was held on 20 April 1998 found the respondent guilty of five charges of misconduct but the appellant decided to give him another opportunity by giving him a final warning that any further act of misconduct and infringement of the appellant's rules and regulations would result in termination of service. The judgment of the Industrial Court shows that the respondent had been issued with warning letters relating to his

discipline and punctuality even before the first enquiry was held. Verbal warning had also been given to him in the past. Learned counsel for the appellant submitted that the misconduct which preceded the second enquiry was the proverbial straw that broke the camel's back leaving the appellant with no choice but to terminate his employment upon the respondent being found guilty of the charges against him. Past misconduct is a relevant factor and the Industrial Court, had in the past, taken into consideration in determining whether the punishment is harsh or otherwise. (See *Malayan Banking Bhd v. Association of Bank Officers*, *Peninsula Malaysia & Anor*, *supra* and Industrial Court cases cited in *Kamala Loshanee Ambalavanar v. Jaffnese Co-operative Society* [1998] 1 LNS 339; [1998] 7 MLJ 61)

[23] In the result, we allowed the appeal by the appellant with costs and set aside the decision of the High Court.